

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS KHEEL,	:	DETERMINATION
OFFICER OF THE CHESTNUT TREE OF ITHACA, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1980	:	
through February 28, 1983.	:	

Petitioner, Thomas Kheel, officer of The Chestnut Tree of Ithaca, Inc., 215 East Seneca Street, Ithaca, New York 14850, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through February 28, 1983 (File No. 801767).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York, on October 17, 1988 at 2:45 P.M. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has administrative jurisdiction to determine issues raised in the petition.

II. Whether petitioner has established that The Chestnut Tree of Ithaca, Inc. had reasonable cause for its failure to timely file and pay taxes due.

III. Whether, if reasonable cause existed, there is statutory authority for the refund to a corporate officer of penalty and statutory interest paid by the corporation under Tax Law § 1145.

FINDINGS OF FACT

1. On October 26, 1984, the Division of Taxation issued to petitioner, Thomas Kheel, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (notice number S841026701T). The notice stated:

"You are liable individually and as officer of The Chestnut Tree of Ithaca, Inc., under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Law."

The notice also stated that taxes assessed against petitioner reflected payments applied to assessments previously issued to The Chestnut Tree. The following amounts were assessed:

<u>Period Ending</u>	<u>Penalty Due</u>	<u>Interest Due</u>	
8/31/80	\$1,875.31	\$468.83	\$1,074.80
11/30/80	2,425.54	606.39	1,308.34
5/31/81	1,672.10	418.03	789.12
11/30/81	1,662.63	415.66	658.52
2/28/82	1,294.31	323.58	462.67
5/31/82	1,487.81	371.96	474.75
11/30/82	2,313.13	578.29	561.59
2/28/83	1,851.69	444.41	381.79

2. On February 12, 1985, a petition was filed with the former Tax Appeals Bureau showing the petitioner as The Chestnut Tree of Ithaca, Inc. d/b/a The Dugout of Ithaca. The assessment number shown on the petition corresponded to the notice number shown above. A copy of that notice was attached to the petition. The petition itself made oblique reference to taxes and penalties assessed for prior years. The petition was accepted by the Tax Appeals Bureau as a protest to notice number S841026701T, the officer assessment issued to petitioner.

3. For the eight quarters at issue here, The Chestnut Tree filed sales tax returns without remittance of the tax shown due. Two returns were filed in a timely fashion and the remainder were filed late. Upon receipt of the returns, the Division of Taxation issued notices and demands to The Chestnut Tree.

4. Petitioner is president of The Chestnut Tree, which operates a bar called The Dugout. He does not contest his liability for sales and use taxes owed by the corporation, but he seeks a refund of penalty and statutory interest paid by the corporation. A second individual, Neal Krouse, was also a corporate officer during all relevant periods.

5. The Chestnut Tree began doing business as The Dugout in October 1976. The business was purchased, in part, with a \$50,000.00 loan from a commercial bank. During the first two years of its operation, The Chestnut Tree timely filed returns and paid New York State sales tax. On December 13, 1978, the building in which The Dugout was located was heavily damaged by fire. The Dugout was forced to close and did not reopen until March 1979.

6. After the fire, the building's landlord refused to pay for any needed repairs to the building or to grant The Chestnut Tree a lease abatement while the business was closed. The Chestnut Tree's insurance did not fully cover its fire losses plus expenses incurred in renovating the building. As a result, The Chestnut Tree and petitioner suffered deep financial hardships. Beginning with the sales tax quarter in which the fire occurred and continuing until late in 1983, The Chestnut Tree consistently failed to meet its sales tax obligations.

7. Petitioner suffered both financially and personally from his struggle to keep The Dugout operating. The financial pressures caused a break-up of his marriage and eventually caused him to seek psychological counseling. Because of the stress caused by this situation, petitioner was unable to concentrate on the financial details of his business.

8. There is no evidence that The Chestnut Tree failed to timely file sales tax returns for periods after February 28, 1983. In September or October 1984, The Chestnut Tree entered into a trust account agreement with the State. On a monthly basis, the corporation deposits monies into an account. At the end of each quarter, the corporation files a sales tax return and the State

withdraws money from the trust account to satisfy the sales tax obligation. The Chestnut Tree has timely filed sales tax returns and paid sales tax since entering into the trust agreement.

9. In September 1984, a payment of \$8,000.00 was made towards The Chestnut Tree's then existing sales tax obligations. This payment was followed by monthly installments of \$1,114.49. The Division applied all payments to the oldest outstanding obligation, including penalty and interest charges.

10. The Chestnut Tree made an amnesty application which was accepted by the Division. At the time application was made, the following amounts were owed:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>
November 30, 1981	\$ 547.54	\$1,354.35
February 28, 1982	179.82	598.38
November 30, 1982	2,313.13	3,142.37
February 28, 1983	1,851.69	2,443.30

11. Petitioner made a separate amnesty application in January 1986. The Division found that petitioner no longer had any personal tax liabilities because all underlying corporate assessments had been paid by The Chestnut Tree.

12. On March 6, 1986, after both amnesty applications were filed and all taxes paid, petitioner filed a perfected petition requesting a refund of all penalties and statutory interest paid by The Chestnut Tree for the period September 1, 1978 through February 28, 1983.

13. The Chestnut Tree did not file an application for refund of penalties paid by it.

CONCLUSIONS OF LAW

A. In *Matter of Parsons v. State Tax Commn.* (34 NY2d 190), the court held that the State Tax Commission had no authority to recover taxes through the issuance of a notice of determination of tax due under Tax Law § 1138, where correct and adequate sales tax returns had been filed, and therefore, the Commission lacked jurisdiction to conduct administrative hearings pursuant to such a notice (see also, *Matter of Hall v. New York State Tax Commn.*, 108 AD2d 488). An amendment to the Tax Law conferred jurisdiction on the Commission to hold hearings concerning the liability of a corporate officer for sales and use taxes due for a period in which the corporation filed a correct and sufficient return (Tax Law § 1138[a][3][B], as added by L 1985, ch 65, § 82, eff April 17, 1985). The amendment had no effect with regard to notices issued prior to the effective date of the amendment (cf., *Matter of Robert Stern*, Tax Appeals Tribunal, September 1, 1988). The decision in *Parsons* controls here, because The Chestnut Tree filed correct returns for the periods in issue without payment of tax shown on the return. The fact that petitioner challenges penalties imposed for failure to timely pay tax when due rather than the tax itself does not dictate a different result (see also, Tax Law § 1145[a][7], as renum by L 1985, ch 65, § 86). Accordingly, the Division is without subject matter jurisdiction of the petition.

Even if the perfected petition was deemed an application for refund of penalties, rather than a petition for review of a notice of determination, petitioner would not be entitled to the relief sought here. There is no statutory provision which would allow a corporate officer to apply on his own behalf for a refund of penalties paid by a corporation. The Chestnut Tree's remedy in

the instant case would have been to pay all taxes, penalty and interest due and apply for a refund of penalty under the provisions of Tax Law § 1139. Such an application must be made "within three years after the date when such amount was payable under [article 28]" (Tax Law § 1139[a][ii]).

B. The petition of Thomas Kheel, officer of The Chestnut Tree of Ithaca, Inc., is dismissed.

DATED: Albany, New York
December 15, 1988

/s/ Jean

Corigliano _____
ADMINISTRATIVE LAW JUDGE